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IN THE

Supreme Court of the United States

October Term, 1966

~~1964~~ 157

MORRIS KOLITCH and ALVIN REISCH,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department

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RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

This is a petition for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Department, to review a decision of that court, entered February 1, 1966, affirming, without opinion, a judgment rendered after a trial by the Supreme Court of the State of New York, County of New York, on February 26, 1965, convicting the petitioners of criminally concealing and withholding stolen and wrongfully acquired property, as a felony [N. Y. Penal Law, §1308]. The petitioner

Kolitch was sentenced to State Prison for a term of two to four years, and the petitioner Reisch was sentenced to State Prison for a term of from one year and six months to three years. A third defendant, Solomon Leibowitz, tried and convicted with Kolitch and Reisch, was given a suspended sentence and has not appealed. On February 25, 1966, the petitioners Kolitch and Reisch were denied leave to appeal to the Court of Appeals of the State of New York (FULD, J.). The Appellate Division thereafter, on April 26, 1966, granted the petitioners' motion to amend the remittitur to recite the following:

> "Upon the appear herein there were presented and necessarily passed upon questions under the Constitution of the United States as follows: Defendants contended that their rights under the Fourth and Fourteenth Amendments to the Constitution were violated respectively by unlawful searches and seizures and by the use of alleged confessions after denial of the right to counsel."

Questions Presented

1. Whether the petitioners were properly arrested and stolen goods were properly seized from their possession when police officers, after information received from an informant was confirmed by their observations, questioned the petitioners on the street, received evasive answers, asked one of the petitioners to step into the store to which he was delivering the goods, and thereupon received an admission from him.

2. Whether the identity of a police informant must be disclosed upon a motion to suppress evidence when the in-

formation he supplied served merely as the basis for a police inquiry which produced independent probable cause.

3. Whether one of the petitioners obtained proper judicial consideration of his claim that he asked for permission to call an attorney while in police custody.

Summary of Argument

1. A New York City detective obtained information from a confidential informant that a truck loaded with stolen Gillette brand products would be in a certain vicinity at a specified time. The detective and his brother officer observed the described truck at the place specified, and saw the petitioners unloading boxes of Gillette products from it. When questioned on the street, one of the petitioners gave evasive answers; the other initially falsely denied having anything to do with the truck and its contents, but he was asked to step into a store to which he had been seen delivering the goods, and as he entered the store he admitted his culpability to the detectives. The officers, then, had ample cause to arrest the petitioners.

2. Disclosure of the informant's identity was not required in this case because the information received from the informant served merely to initiate the police investigation [*Rovario* v. *United States,* 353 U. S. 53 (1957); *People* v. *Malinsky,* 15 N. Y. 2d 86 (1965)]. The police officers' own observations and inquiries constituted the basis for the proper arrest of the petitioners.

3. One of the petitioners testified at the trial that, though he was not questioned by the police while he was at the station house, he did ask to consult an attorney, and his request was denied. His testimony was contradicted by the testimony of the officers who questioned him, and was unsupported by the testimony of a co-defendant at the trial. Though the petitioner did not move for exclusion of his confession on this ground, the trial court itself considered the issue, and properly discrediting the petitioner's testimony, found the confession admissible in evidence.

POINT I

The evidence of the petitioners' guilt was lawfully obtained.

Acting upon information that a yellow and red truck marked "AA Trucking" would be in the vicinity of Broadway and 18th Street on the afternoon of December 3, 1962, and would be carrying stolen Gillette products, two officers spotted a truck of the precise description two blocks from the place specified, observed three men conversing nearby, and saw two of the men enter the truck and drive it to a store at 18th Street, near Broadway, where they met the third man (A24-8, A36-8, A40, A45-6, A48, A52).* Continuing their alert, diligent investigation of an apparent crime in progress, the officers watched while the men unloaded cartons labelled "Gillette" from the truck (A54-62). At this point, the officers, obviously impelled to immediate action by the "Gillette" markings and the confederates' dis-

* References, unless otherwise indicated, are to the pages of the printed appendix of the Record on Appeal to the Appellate Division of the Supreme Court of the State of New York, prepared by the petitioners.

posal of the apparent contraband, exercised "the right," if not the duty, "of police to stop a person in the public street and question him under circumstances that would reasonably actuate investigation and inquiry" [see *People* v. *Rivera*, 14 N. Y. 2d 441, 443 (1964), *cert. denied*, 379 U. S. 978 (1965)]. Two of the men, petitioner Kolitch and his helper, co-defendant Leibowitz, denied any knowledge as to the owner of the property (A47, A55-6). Kolitch could not produce a bill of lading for the cartons carried in the truck and evaded reasonable questions as to their source. As one of the officers explained at the hearing, "He just didn't answer me and every question I asked him he repeated" (A47). Petitioner Reisch, who had been seen entering a store with two of the cartons, was questioned when he came back out to the street (A26, A40, A46, A56). When he brazenly denied entering the store, stating that he was "just walking along the street" (A40, A46), he was properly asked to go into the store with the officer, to find out whether or not he had just brought in some of the suspect cartons. As they entered, Reisch, apparently recognizing that the cartons inside would expose him, and attempting to help himself, admitted that the cartons were stolen; professing a desire to cooperate, he assured the detective that the store owner "knows nothing about it," and warned that his accomplices outside were "tough fellows" (A40, A46). Unquestionably, the officers had probable cause to believe at this point that the petitioners were committing a crime, and were entitled to arrest them and seize the contraband in their possession. The three confederates were taken to the detectives' squad offices, together with the truckload of stolen goods (A27-32, A39, A46-7, A50-1, A56-7, A63).

The petitioners recognize that "the legality of an arrest is governed by state law" (petition, p. 10), and "do not dispute that the police have a right to interrogate a suspect as part of a routine investigation and that such interrogation does not constitute an arrest" (petition, p. 17). The petitioner Reisch argues, however, that prior to his admission, the police had insufficient cause to arrest him as a result of their questioning. By asking Reisch to go back to the store he had just left in order to check his denial that he had carried two of the unloaded cartons into that store, the police, it is argued, restricted Reisch's liberty of movement, thus groundlessly arresting him; Reisch's consequent admission, therefore, was unlawfully obtained, and could not be used as a basis for his arrest. The argument is spurious. The patent lie he gave to the detective, coupled with the obviously reliable information that the goods which the police had seen Reisch handling were stolen, would have been basis enough for his arrest [*People* v. *Brady*, 16 N. Y. 2d 186 (1965)]. Thus, this is not a case, such as relied on by the petitioners, in which the investigating officers had been given no sufficient knowledge by their informant to indicate that the person to be searched had actually engaged in criminal activity and had themselves observed no behavior which did not appear to be innocent [*cf.*, *Henry* v. *United States*, 361 U. S. 98 (1959); *Beck* v. *Ohio*, 379 U. S. 89 (1964)], or where the officer's reason for stopping a defendant went entirely unexplained [*People* v. *McCarthy*, 14 N. Y. 2d 206 (1964)]. Reisch was properly approached on the street, and his false reply to reasonable questions demonstrated a consciousness of guilt which added weight to the detectives' assessment of probable cause. But, instead of arresting him at this point, one of the detectives asked

that Reisch walk with him a few feet into a store, in order to establish Reisch's role more clearly. By no stretch of the imagination can the detective's request be deemed an unreasonable act. When Reisch thereupon admitted that the goods were stolen, there existed not only probable but certain cause for his arrest.

The petitioner Kolitch argues that his arrest was based on Reisch's admission, and that if Reisch's statement was unlawfully obtained, the arrest of Kolitch was improper. This argument, too, is untenable. Kolitch has no standing to object to the use against him of information obtained from Reisch, for the questions put to Reisch in no way invaded Kolitch's rights [*Wong Sun* v. *United States,* 371 U. S. 471, 492 (1963)]. Moreover, as with Reisch's initial lie, Kolitch's own evasive answers had already established cause for his arrest, though Reisch's admission served as an overwhelming addition to the information against Kolitch.

But the petitioners, confusing the issue of the officers' probable cause to arrest them with the question whether petitioners obtained a fair hearing on their motion to suppress the evidence, seem to argue further that there was no adequate basis for the initial stopping of these petitioners on the street, since the officers' suspicion was based on the word of an unidentified informer (petition, pp.32-3, 37-8). This contention is absurd, since it is clear that an arrest—much less an initial inquiry on the street—may be based on hearsay information obtained from a confidential informant [*Draper* v. *United States,* 358 U. S. 307 (1959); *People* v. *Rogers,* 15 N. Y. 2d 422 (1965)]. *People* v. *Malin-*

sky, 15 N. Y. 2d 86 (1965), relied on by the petitioners, also establishes that the police may take investigatory action on the basis of confidential information, and draws a sharp distinction between probable cause at the time of arrest and the duty to disclose an informant's identity at the time of the hearing.

POINT II

The petitioners' request for identification of the police informant was properly denied.

The only issue raised by petitioners concerning disclosure of the identity of the police informant is whether the rule concerning disclosure set forth by the New York Court of Appeals in the decision of *People* v. *Malinsky*, 15 N. Y. 2d 86 (1965), was properly applied by the Appellate Division in its consideration of the present case. Of course, this question as to interpretation of state law does not warrant review by this Court. In any event, even if it be assumed that under certain circumstances disclosure of an informant at a hearing on a motion to suppress evidence can be a mandate of constitutional magnitude [*cf. McCray* v. *Illinois*, 1307 Misc., *cert. granted*, May 23, 1966, —— U. S. ——, 34 U. S. L. W. 3399; *United States ex rel. Coffey* v. *Fay*, 344 F. 2d 625, 631, n. 4 (2d Cir. 1965)], neither state nor federal decisions would require disclosure in every instance, or in the present case [*Rovario* v. *United States*, 353 U. S. 52 (1957); *Rugendorf* v. *United States*, 376 U. S. 528 (1964)].

For, even under the liberal and entirely reasonable rule for disclosure of informers set forth in *People* v.

Malinsky, supra, it is plain that the hearing into the petitioners' arrest and search in this case was a fair one, and that revelation of the informant's identity, though requested by the petitioners, was unnecessary. The officers' observations of the petitioners prior to approaching them for questioning fully and objectively confirmed the detailed information supplied by the informant—the time, and location, and nature of the illicit activities. Then, by questioning the defendants as to their activities, the officers obtained answers which put beyond any reasonable question the right of the detectives, of their own knowledge, to arrest these men.

As to these observations and incriminating statements, the detectives confronted the petitioners at the hearing and were subject to cross-examination and possible contradiction. The *Malinsky* decision noted that a defendant is entitled to disclosure of an informant, at a hearing into the basis for his arrest, only where "the legality of the action taken by the police turns upon the believability of the information and not upon facts which the officer witnessed and upon which he could be cross-examined" [15 N. Y. 2d 86, at p. 93]. Indeed, a basic rationale for the decision in *Malinsky* applies directly to the case at bar, and confirms the fairness of the hearing:

> "[A]ctually [the decision's] effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search. Such a practice would ordinarily make it unnecessary to rely on the communications from the informer to establish reasonable cause."

The New York Court of Appeals in *Malinsky* concluded that:

> "Disclosure of the informer's identity is required only in those cases, and they are relatively rare, where there is insufficient evidence, apart from the arresting officer's testimony as to the informer's communications, to establish probable cause. Where such separate evidence exists, the arrest and consequent search will be upheld without requiring disclosure of the informer" [15 N. Y. 2d 86, at pp. 93-4].

Thus, *Malinsky* contemplates that police officers, and hearing courts, act as they did in this case.

The petitioners further argue, in effect, that regardless of the officers' testimony as to their observations, petitioners were entitled to disclosure of the informant's identity in order effectively to test the credibility of the police officers at the hearing. According to petitioners, if the informer did not exist, the officers' testimony as to their observations and petitioners' admissions would be cast in doubt (petition, pp. 32-4). But this contention seeks to overrule *Malinsky* by effectively requiring disclosure of the informant in every case. *Malinsky* recognizes that a police officer's credibility as to the admissions he himself obtained and the observations he made may be tested in traditional manner—through cross-examination, or introduction of other evidence as to the petitioners' activities at the time they were observed.

> "When, as here, the person whose name is held back is a mere transmitter of information and not in any sense a competent witness as to the crime itself and when there is, as there is here, strong and dependable proof of the accuracy of his information, 'proper bal-

ance' makes non-disclosure appropriate'' [*People* v. *Coffey*, 12 N. Y. 2d 443, 453 (1963)].

If ''the informant's information does no more than trigger or initiate the investigation and such investigation uncovers sufficient evidence, separate and apart from the informer's communication, to establish probable cause for the arrest and search, the informer's identity need not be divulged'' [*id.* at 454 (dissent)].

POINT III

Petitioner Reisch's claim that he asked for permission to call an attorney while in police custody was fully considered and rejected by the state courts, and requires no further consideration.

Testifying at the trial, the petitioner Reisch stated, in contradiction to the testimony of the arresting officers, that he was not questioned by the police and had made no admission to them at the time of his arrest and thereafter, but that when he was taken to the detectives' offices he had asked, on several occasions, to communicate with his family and with an attorney (A273-5). He now contends that it was error for the trial court to fail to instruct the jury as to ''the significance of this testimony'' (petition, pp. 26-7). The fact is, however, that no instruction to the jury on this point was requested. Since jury consideration of the validity of a confession is not a right conferred by Federal law [*Jackson* v. *Denno*, 378 U. S. 368 (1964)], but is mandated only by state law [*People* v. *Huntley*, 15 N. Y. 2d 72 (1965)], state procedural standards are applicable. Thus, the defendant's failure to request instruction to the jury

on his confession renders his present challenge to the instructions inappropriate [Code of Criminal Procedure, §420-a; see *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965), *cert. denied*, 383 U. S. 907 (1966)].

Moreover, there was substantial reason for Reisch's attorney to refrain from requesting any instruction to the jury on the admissibility of his confession. Reisch had claimed that he made no admissions. Undoubtedly, he wanted the jury to concentrate its attention on his testimony in this regard. Indeed, Reisch's attorney argued in summation that "* * * we maintain the statement was never made" (598-9; see also 590-2, 595).* To have instructed the jury that, in any event, if he did confess, the jury might consider whether the confession was proper evidence of his guilt, would have had at least the effect of distracting the jury from Reisch's own story [see *People* v. *Mussenden*, 308 N. Y. 558, 564-5 (1955); *U. S. ex rel. Reid* v. *Richmond*, 295 F. 2d 83 (2d Cir. 1961); *Butler* v. *United States*, 350 F. 2d 788, 790 (5th Cir. 1965)]. His attorney, unquestionably aware of the rule that confessions obtained after denial of a request to consult counsel are invalid (A201-2, A373-4)—a rule which, by the time of trial, was the settled law of New York [*People* v. *Noble*, 9 N. Y. 2d 571 (1961); *People* v. *Donovan*, 13 N. Y. 2d 148 (1963)]—made his choice, knowingly and well, to refrain from having the trial jury consider the matter.

But Reisch also contends that he is entitled to a hearing on the matter before the trial judge alone. However, the question of the admissibility of his confession,

* The references are to pages of the typewritten minutes of the complete trial record.

including Reisch's claim of a request for counsel, has already been duly considered, and rejected, by the trial court in the absence of the jury. At the trial, though Reisch did not properly raise the issue of admissibility of his confession with regard to his claimed request for an attorney, arguing only that his confession was inadmissible because obtained before an "illegal detention" caused by an undue delay in arraignment and because it was the product of an unlawful arrest (A367), the court, in holding the confession to be admissible in evidence passed upon Reisch's testimony that he had asked to consult his attorney [*cf. United States* v. *Indiviglio, supra*]. During the presentation of the People's case, the court, discussing the decision of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), had specifically indicated that if one of the defendants had asked for an attorney while being questioned, and his request was not granted, the defendants' constitutional rights would have been violated (A201-2). Later, after the defendant Reisch had so testified, the assistant district attorney, discussing Reisch's motion at the bench to exclude statements made during his detention by the police, conceded that the confession would be inadmissible if Reisch had made such a request. He asked the court to note that

> "obviously in denying the defense motion, and correct me if I am wrong, you have come to the conclusion that even if a separate hearing was had concerning the confession of Reisch made in the squad, that you would have come to the conclusion that the confession was a voluntary one and that the defendant had not, in fact, asked for an attorney and that the confession was admissible and submitted [*sic*] to the jury" (A374).

The court replied: "I think that is a very fair statement and I will expand on it" (A374). The court held that Reisch's testimony as to requesting permission to call his attorney

> "* * * is controverted by the rebuttal testimony of Detective Shannon so therefore I think your statement is correct, Mr. District Attorney, that if a hearing had been asked for on the question of the voluntariness of his alleged confession, or admission against interest, on the basis of the evidence, the contravening of the statement by Detective Shannon, I would still have to submit the matter to the jury and I would have ruled with regard to such motion that the * * * alleged admission was voluntary and that the jury be permitted to take it into consideration" (A374-5).

Thus, the court showed that it had rejected Reisch's claim and accepted the police officers' testimony that no request to call an attorney was made (A353-4).

Reisch's testimony amply warranted such discredit. Reisch had asserted that at all times while in the detectives' offices he was kept in the same room as Leibowitz and Kolitch, his two co-defendants, neither of whom was questioned by the police (A277). But Leibowitz, in testifying, contradicted Reisch by acknowledging that Leibowitz had indeed been questioned (A329-30). And Leibowitz's testimony failed to corroborate Reisch's claim that Reisch had requested an attorney "on several occasions" (A273-5; cf. A332). Reisch's immediate willingness to "cooperate" (A40) was further proof of the absence of a request for counsel.

Nor did the trial court, as Reisch contends, erroneously consider Reisch's claim that he had requested an attorney only with respect to the voluntariness of his confession (petition, pp. 27-8). The court, fully familiar with the *Escobedo* rule, necessarily found, in rejecting Reisch's testimony on this point, that no request for an attorney had been made and that the *Escobedo* decision could not apply in this case. But, once having made his decision that the confessions were admissible, the court was then concerned with the role of the jury, under the ruling of *Jackson* v. *Denno, supra,* and correctly decided that the issue of voluntariness could be presented to the jury. The jury might have considered, with respect to voluntariness, not only the petitioner's contentions as to his prolonged detention (A367), but also his allegation that he had requested permission to communicate with his family, as well as his attorney [*People* v. *Hocking,* 15 N. Y. 2d 973 (1965); *People* v. *Taylor,* 16 N. Y. 2d 1038 (1965)]. Reisch, however, did not ask the court to submit the issue of voluntariness to the jury. His contention as to his confession had been separately directed; the judge had considered the confession's admissibility, the jury its existence and truth. A further hearing, before the judge alone, as to admissibility, is not now required, and further findings with respect to Reisch's alleged request for counsel are unnecessary.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF

A. Cases cited by respondent.

Respondent argues (p. 7) that "an arrest may be based on hearsay information obtained from a confidential informant." Cited in support of this proposition is *Draper* v. *United States,* 358 U. S. 307. However, in that case the informer was a special employee of the Bureau of Narcotics, one Hereford, who is mentioned by name in the prevailing opinion at least a dozen times—a situation quite different from the one relating to the anonymous, faceless, nameless individual relied on herein. Respondent in this connection also relies on *People* v. *Rogers,* 15 N. Y. 2d 422, which deals simply with the sufficiency of an affidavit to sustain a search warrant and makes no reference to arrest.

On the point dealing with the obligation to identify the informant, respondent argues (p. 8) that disclosure is not

invariably required, referring to *Rovario* v. *United States,* 353 U. S. 52, and *Rugendorf* v. *United States,* 376 U. S. 528. But in *Rovario* the suppression was condemned, and we submit that our original argument (pp. 31-38) as to the many unusual and suspicious circumstances surrounding the supposed secret information amply calls for the application of the same rule. In *Rugendorf* the holding turns on the single fact that the point was waived by petitioner through having been "asserted, for the first time, in his reply brief in the Court of Appeals," while herein the argument was consistently made on pre-trial motion to suppress, on the trial and on appeal.

Respondent's attempt (pp. 8-11) to distinguish *People* v. *Malinsky,* 15 N. Y. 2d 86, falls far short of differentiation. We do not need to repeat our original discussion in this regard (pp. 34-37), save to urge, as was held in *Malinsky,* that a finding of probable cause herein rests squarely upon the reliability of the unnamed informer as a source of information, and that defendants were unjustly deprived of all opportunity to show either that the alleged informer was a fiction or, if he existed at all, that he was not reliable.

We have argued (p. 21) that petitioner Reisch was entitled to a hearing on the issue of whether he voluntarily made incriminating statements—a matter closely coupled with denial of his request for counsel. Respondent argues (pp. 11-12) that the case is governed by failure to request instruction to the jury on the subject. Our reply to this contention is two-fold. We have already shown (pp. 23-26) that the trial Court had made its views known, concluding that "all three defendants have exceptions to the statement or ruling" (A375). Secondly, as has been pointed out (p. 28), the trial herein was concluded several months prior to the Court of Appeals holding in *People* v.

Huntley, 15 N. Y. 2d 72, which for the first time laid down rules of procedure for cases, including those already tried, involving any issue as to the voluntariness of confessions.

The recent Court of Appeals decisions in *People* v. *Hocking,* 15 N. Y. 2d 973, and *People* v. *Taylor,* 16 N. Y. 2d 1038, both referred to by respondent, held that police refusal to a defendant to see a member of his family during a questioning period constituted a circumstance germane to the issue of voluntariness. Petitioner Reisch asked (A273) and was denied permission to call his home—this testimony was not contradicted by the detectives—and it is manifest that he is entitled under the subsequently prescribed procedure to a plenary hearing.

B. Pertinent recent holdings.

Respondent's attempt to reduce the questions presented to mere factual issues invites the application of this Court's declaration that "when constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record." Mr. Justice Black in *Brookhart* v. *Janis,* 384 U. S. 1, 86 Sup. Ct. 1255 (unofficial advance sheets of May 1, 1966).

It is scarcely necessary to refer to the monumental holding in *Miranda* v. *Arizona,* 384 U. S. 436, 86 Sup. Ct. 1602 (unofficial advance sheets of July 1, 1966), dealing at length with the now firmly established rule that a defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on involuntary confession, irrespective of its truth or falsity, even if other evidence amply supports the conviction; the principles inhibiting interrogation after denial of request for presence of counsel; and the right to post-conviction hearing.